

HOUSE OF LORDS.

Between Ann Salter, Spinster, - - - - - Appellant.

A N D

Francis Hite, Edward Ramsey, and Jane his Wife, Hannah Salter Afshe, Widow, Mary Salter, Margaret Salter, John Partridge the Elder, John Partridge the Younger, and Samuel Mare, - - - - - Respondents.

The CASE of the Respondents Francis Hite, Edward Ramsey and Jane his Wife, John Partridge the Elder, John Partridge the Younger, and Samuel Mare.

Mr. Afshe's Situation before he came to his Fortune.

MR. Michael Salter Afshe (the Validity of whose Will is the Subject of the present Contest) was, for the greatest Part of his Life, in very indigent and necessitous Circumstances; exercising the Business of an Apothecary at Crediton in the County of Devon, under his original Name of Michael Salter, but deriving from thence scarcely sufficient to supply him with the common Necessaries of Life; in that Situation he continued, until a very few Years before his Death; receiving, and indeed chiefly depending upon the Bounty of his Friends and Acquaintance, for the Support of himself and Family: particularly of the Respondent Mr. Hite; who for a Course of many Years, very liberally supplied him with Victuals, Drink, Apparel, and Money. Of which Mr. Salter always entertained a very grateful Remembrance, and frequently declared his Resolution to make a Recompence for these Kindnesses to Mr. Hite, or to his Family, if ever it should be in his Power.

1763 Mr. Afshe became possessed of an Estate of 300l. per Ann.

About the Year 1763, one Henry Afshe, a Relation of the said Michael Salter's, died; upon whose Death, Mr. Salter came into the Possession of an Estate of about 300l. a Year, and assumed the Surname of Afshe; but still retaining a grateful Sense of his many Obligations to Mr. Hite, he from this Time constantly employed him as his Attorney, and appears to have advised with, and consulted him upon every material Transaction of his Life; save only, as to the Disposition which he meant to make of his Fortune after his Death; and which he might probably think it improper to employ, or advise with Mr. Hite about; as he intended that Mr. Hite and his Family, should, in a certain Degree, be benefited by that Disposition; for, he seems to have used every imaginable Precaution, to conceal the Contents of his Will, from the Knowledge of all those, who were to be interested therein; and yet, determined to make such a Disposition of his Fortune, as might reasonably satisfy the Expectations of those, whom he considered as Objects of his Attention, either from Nature, Affection, or Gratitude.

Employs Mr. Paul to make his Will.

He accordingly employed one Mr. Matthew Andrew Paul, an Attorney of great Credit and Character at Exeter, to prepare his Will; which bears Date the 31st Day of July, 1766, and was executed by the Testator, at the Turk's-Head, an Inn at Exeter, about a Week afterwards, in the Presence of the said Mr. Paul, Mr. Josias Salter, a Brother-in-law of the Testator, and one Mrs. Elizabeth Caunter, an intimate Acquaintance and Neighbour of the Testator's at Crediton, and these Three were the subscribing Witnesses to his Will.

The Testator's Will, 31st July, 1766. An Annuity of 80l. to his Wife, charged on Part of his Real Estate.

By this Will, the Testator, in the first Place, provides for his Wife in these Words: viz. " I GIVE unto my beloved Wife HANNAH SALTER ASSHE, ONE ANNUITY or yearly Rent-charge of EIGHTY POUNDS, to be issuing and payable quarterly out of ALL THAT my Manor, and all those my Messuages, Bartons, Farms, Lands, Tenements, Hereditaments, and Premises, with their Appurtenances, situate in the Parish of Sowton, otherwise Clift Fomifon, in the said County; which said Annuity I compute, and declare to be more than the Third-Part of the clear neat Produce and Income of all my said Lands and Estates; and which I hereby intend, will, and declare, shall be in full Satisfaction of all her Dower and Thirds which she may hereafter claim to have after my Decease, out of my said Manor, Lands, and Estates aforesaid; or other my Lands, and Estates whereof I shall die seized: and which said Annuity I will and declare to be a sufficient Maintenance for her; and more so, in that I had no Portion or Fortune with her."—The Testator then proceeds to give to his said Wife, and to his Sister Anne Salter the Appellant, all his Household Goods and Furniture equally between them; on Condition that his Wife should, within Six Months after his Death, execute a Release of her Dower to his Trustees therein after named: but in case she refused to do so, then the Testator revoked that Bequest, and gave his said Household Goods and Furniture to his Trustees and Executors, in order that they might sell the same, and apply the Money arising therefrom, towards Payment of his Debts, Legacies, and Funeral Expences.

Other Annuities.

—The Testator then goes on to provide for his other Relations, by giving them Annuities for Life, chargeable upon his Real Estates; namely, to his Cousin, William Salter, an Annuity of Fifty Pounds immediately, and another Annuity of Forty Pounds, after the Death of the Testator's Wife; and upon the Contingency of his Sister Anne Salter's being then living. To Mary, the Daughter of the said William Salter, an Annuity of Twenty Pounds, to commence after the Death of her said Father; to his Cousin, the Respondent Margaret Salter, an Annuity of Twenty Pounds immediately; and to his Cousin Elizabeth Williams, a Legacy of Twenty Pounds.—And after giving several small Legacies to his Acquaintance and Servants, the Testator gives the Respondent Francis Hite,

A Legacy of 350l. to the Respondent Mr. Hite.

a Legacy of Three Hundred and Fifty Pounds, in the following Words, viz. " Also I give to Francis Hite, of Crediton aforesaid, Gentleman, the Sum of 350l. of lawful Money of Great-Britain, who hath been a particular Friend unto me for many Years past, and from whom I have had and received many valuable Assurances, during the Time of my Adversity, and before my present Estate and Fortune descended unto me by the Death of Henry Afshe, Esq; and since; I do now acknowledge and declare his true and just Performance of the Transactions of my Affairs, for which no ample Compensation hath been made him; and I give unto the said Francis Hite the said 350l. over and beyond the Monies he hath already received of me: and which said Sum I do hereby will and declare, is by me meant and intended to be in full of his Demands on me, or my Estate and Effects, for such his Transactions as aforesaid."

Disposition of his real Estate.

The Testator then proceeds to dispose of his Real Estates: and after devising a Part of them to the Respondent John Partridge the Younger, for a Term of 200 Years, as an auxiliary Fund to his Personal Estate, for the Payment of his Debts, Legacies, and Funeral Expences, he gives the whole of such Real Estates unto the Respondents John Partridge the Elder, and Samuel Mare: To the Use of his Sister Ann Salter the Appellant, for her Natural Life; Remainder to the first and other Sons of her Body, successively in Tail Male; Remainder to her Daughters as Tenants in common in Tail; Remainder to William Salter, one of the Testator's Cousins, for his Natural Life; With Remainder to his first and other Sons successively in Tail Male; Remainder to the Respondent Hannah

Hannab Salter Afsbe, the Testator's Wife, for her Natural Life; and after her Decease, to remain to her Issue in Tail, in such Manner as he had limited the same to his said Sister *Ann Salter*; *With Remainder to the Respondent Margaret Salter*, in the same Manner; and for Default of such Issue, then the Testator devised all his said Manor Messuages, Bartons, Farms, Lands, Tenements, Hereditaments, and Premises, with their Appurtenances, unto the Respondent *Jane Ramsey*, (by her then Name and Description of *Jane Byrdall*, of *Crediton* aforesaid, Widow of *John Byrdall*, late of *St. Mary Church*, in the same County, Surgeon, deceased) and to the Heirs of her Body; *With Remainder to the said Jane Byrdall*, her Heirs and Assigns for ever.—Then follows a Proviso, whereby the said Testator declared his Will to be, that his Trustees, after Payment of the said several Annuities, should receive and take all the overplus Rents and Profits of his said Estates, and pay the same into the Hands of his said Sister *Ann Salter*, she being but of a moderate Understanding, at four equal Quarterly Payments; and that the same should not be paid unto any other Person or Persons, who might claim the same by Virtue of any Bargain, Sale, or Assignment from her, nor into the Hands of any other Person or Persons whatsoever, whom she might happen to marry; but only into her own hands, during her Life, whether she should be sole or covert; and so as that such Husband might not have any Thing to do therewith.—The Testator then proceeds to give the Residue and Remainder of his Personal Estate unto the Respondents *John Partridge* the Elder, and *John Partridge* the Younger, to be by them disposed of, and applied towards the Payment of his Debts, Legacies, and Funeral Expences, and appoints them Executors of his said Will.

Depositing of the Will. After this Will was executed, it was inclosed and sealed up in an Envelope or Cover; and before the Testator left the Inn, he was under some Difficulty, what he should do with his Will; expressing his Fear, that if he should carry it home with him, it might come to the Knowledge or Custody of his Wife, which he was anxious to prevent. Whereupon the said *Josias Salter* his Brother-in-Law, advised him to deposit the Will in the Hands of one of his Friends; and accordingly the Testator, very soon afterwards, deposited this Will in the Hands of one *Susannab Franks*; requesting her to lock it up safely in her Box, until he should call for it again; and in case of his Death, in the mean Time, to deliver it to the Respondent *John Partridge* the Elder.

Testator survived all the subscribing Witnesses to his Will; It happened, that the Testator survived all the Three subscribing Witnesses to his Will; and yet it does not appear, that he ever paid any Regard to that Circumstance; for he never called upon Mrs. *Franks* for a Re-delivery of the Will; nor took any other Notice of it, than by occasionally declaring to some of his particular and intimate Acquaintance, that he had made a Will, or (to use his own Expression) settled his Mind.

—And died 14th August, 1767. On the 14th of August 1767, the Testator died without Issue; leaving the Appellant, his only Sister and Heiress at Law, and the Respondent *Hannab Salter Afsbe* his Widow; and in the Course of that Month *Susannab Franks*, in Compliance with the Testator's Request, delivered his Will to the Respondent *John Partridge* the Elder, without having at any Time before parted with it out of her Custody.

Indorsement on the Envelope. Upon the Envelope or Cover, in which this Will was inclosed, were written these Words, viz. " *This Will not to be opened till three Months after the Death of Mr. Salter Afsbe*. This Indorsement is of the same Hand-writing with the Body of the Will itself; but is inconsistent with the Testator's Direction, in the very Beginning of his Will, touching the Manner of his Interment; which certainly escaped Attention at the Time of writing the Indorsement: However Mr. *Partridge*, utterly unacquainted with the Contents of the Will, and governed by the Words of the Indorsement on the Envelope, kept it by him till the Three Months from the Testator's Death, were nearly expired; and then delivered it to his Son, the Respondent *John Partridge* the Younger, directing him to carry it to the Respondent *Francis Hite*; who he knew was the Attorney, and intimate Acquaintance and Friend of the Family. As soon as *John Partridge* came to Mr. *Hite's* House, and before he delivered the Parcel to him, he thought proper to send a Message to Mrs. *Afsbe* the Testator's Widow, informing her, that he had something which he believed belonged to the Family, and desiring to know whether he should wait on her, or whether she would come to him; to which Message Mrs. *Afsbe* returned for Answer, that she would soon be at Mr. *Hite's* House.

The Will opened, and the Conduct of the Parties on that Occasion. Accordingly, in about a quarter of an Hour afterwards, Mrs. *Afsbe*, together with her Cousin, *William Salter*, and her Sister in Law, *Ann Salter*, the Appellant, came to the House of the Respondent *Francis Hite*; when, and not before, Mr. *Partridge*, junior, took the Parcel out of his Pocket, and delivered it to Mr. *Hite*; saying, That he had received it from his Father, the Respondent *John Partridge* the Elder, and imagined it to be the Will of Mr. *Mikael Salter Afsbe*; and being then about to leave the Room, Mrs. *Afsbe* desired him to stay and hear the Will read; saying, it was very likely, there was something in it which concerned him, or his Father; because he had the keeping of it.—Mr. *Hite* then proceeded, at the Request of Mrs. *Afsbe*, to open the Will, and read it; but before he had gone far in such reading, he was interrupted by Mrs. *Afsbe*, who flew into a violent Passion, denying it to be her Husband's Will, or that the Signature thereunto set, was of his Hand-writing; and after behaving in a very outrageous manner for near half an Hour, she left Mr. *Hite's* House, and the Will in his Custody.

The Respondent Mr. *Hite*, apprehending from this Specimen of Mrs. *Afsbe's* Conduct, that the Validity of her Husband's Will would be very strenuously disputed, even by her who took a more beneficial Interest under it, than she would have been entitled to upon an Intestacy; thought proper to take the necessary Steps for establishing the Will, although his own Interest under it was comparatively trifling, and that of his Daughter Mrs. *Byrdall* so remote, as to be reduced to a mere Possibility.

13th Jan. 1768, the Respondents Bill to establish the Will. And accordingly, on the 13th of January, 1768, the Respondents *Francis Hite* and *Jane Ramsey*, (by her then Name of *Jane Byrdall*) exhibited their Bill in the High Court of Chancery, against the Appellant *Ann Salter*, as the Testator's Heiress at Law, and also against the other Respondents, *Hannab Salter Afsbe*, *Mary Salter*, *Margaret Salter*, *John Partridge* the Elder, *John Partridge* the Younger, *Samuel Mare*, and the said *William Salter*, deceased; praying that the said Testator's Will might be established, and the several Trusts thereof performed and carried into Execution.

18th April, 1768, the Appellant's Cross-Bill, praying an Issue. But before any of the Defendants had answered this Bill, viz. on the 18th of April 1768, the Appellant *Ann Salter* filed her Cross-Bill, against the Respondents *John Partridge* the Elder, *John Partridge* the Younger, *Francis Hite*, *Jane Ramsey*, (by her then Name of *Jane Byrdall*) *Samuel Mare*, *Hannab Salter Afsbe*, *Margaret Salter*, *Mary Salter*, and the said *William Salter*; praying, that an Issue at Law might be directed, to try the Validity of the said Testator's Will.

9th July, 1770, Decree directing an Issue Deviseavit vel non. Both these Causes being at Issue, and several Witnesses having been examined on both Sides, (the Purport of whose Depositions will hereafter be taken notice of) they came on to be heard, on the 9th of July 1770, before the present Master of the Rolls; when his Honour was pleased to order, that the Parties should proceed to a Trial at Law, at the then next Lent Assizes to be holden for the County of *Devon*, on the following Issue, " *DEVISE- SAVIT VEL NON* " and the Consideration of Costs and all further Directions were reserved until after such Trial should be had.

This



The Issue tried.

This Issue was accordingly tried at the *Lent* Affizes for the said County of *Devon*, in the Year 1771, and a special Jury was struck and summoned on that Occasion, at the Instance of the Appellant; but only Three of the special Jurymen being then present, the Court, as is usual in the like Cases, ordered the Pannel to be completed by Talefmen.

During the Course of this Trial, which lasted Fourteen Hours, a great Number of Witnesses were examined, both for and against the Will, who spoke nearly to the same Effect, as they had before deposed to, upon their Examination in the Court of Chancery.

Substance of the Evidence to impeach the Will.

The Substance of the Evidence, first attempted to be given against the Will, was, First,—Certain Declarations, alledged to have been made by the Testator subsequent to the Date of his Will, and down very near to the Time of his Death; that he had made no Will, but intended to make one, so soon as he could settle his Accounts with the Respondent *Francis Hite*. Secondly,—That the Testator's Name, and the Names of the Witnesses, *Matthew Andrew Paul*, *Josias Salter*, and *Elizabeth Caunter*, were not like their usual manner of Hand-writing. Thirdly,—That Mr. *Paul* had never been employed by the Testator in any of his Affairs, nor could any Draught of the Will be found amongst Mr. *Paul*'s Papers; neither was there any Entry in his Books, of any Charge made against, or Sum of Money received from, the Testator for making his Will. Fourthly,—That the Will itself was not of the Hand-writing of Mr. *Paul*, or any of his known Clerks; and Fifthly,—That the Witnesses, *Josias Salter* and *Elizabeth Caunter*, were both at their respective Habitations in *Crediton*, and in a declining and dangerous State of Health, at the Time when the Will is supposed to have been attested by them at *Exeter*; which, according to the Evidence for the Will, was on the 6th or 7th of *August*.

Evidence in support of it.

The Evidence adduced in support of the Will, was, First—an Application made by the Testator to Mr. *Mare*, a Man of considerable Fortune and of unblemished Reputation in *Crediton*, in the Month of *July* 1766, to permit the Testator to make use of his Name as a Trustee in his Will; and that about a Month or five Weeks afterwards, the Testator informed Mr. *Mare* of his having made that Use of his Name, and expressed his Satisfaction at having made his Will, for that now his Family would be settled—Secondly, The positive and clear Testimony of no less than Twelve Witnesses to the respective Hands-writing of the Testator, and of the Three Subscribing Witnesses to his Will; and the like Testimony of Nine Witnesses, to the Testator's Sanity, both before and after the Date of the Will, and home to within a few Days of his Death.—Thirdly, The particular Account given by *John Vicars*, the Master of the *Turks-head* Inn at *Exeter*, of the Execution of the Will, in the Presence of all the Three Witnesses at his House, who deposed, That during *Lammas* Fair, which began *Tuesday* the 5th and ended *Thursday* the 7th of *August* 1766, between Two and Three of the Clock in the Afternoon, (and as he thought the 2d or 3d Day of the Fair,) the Testator, together with Mr. *Paul* and *Josias Salter*, came to the Witness's House, and asked for a Room, to do Business in: That the Witness thereupon shewed them up-stairs into his Dining Room; and whilst he was turning up the Leaf of the Table to accommodate them, he saw Mr. *Paul* take a Paper-Parcel (describing the Envelope or Cover) out of his Pocket, and take a Parchment out of the Parcel.—That the Witness, then went down Stairs, and immediately afterwards, *Elizabeth Caunter* came to the House, enquiring, whether Mr. *Afshe* and Mr. *Josias Salter* were there; and being answered by the Witness in the Affirmative, was by him shewn into the said Dining-Room.—That soon afterwards the Bell of that Room being rung, the Witness went up, and received Orders to make a Tankard of Negus; and that Mr. *Paul* was then reading a Parchment-Writing, which by some Words that the Witness heard he apprehended to be a Will.—That the Witness, after having made the Negus, carried it up; when he saw the Testator, and the said Three other Persons, all sitting at the Table; and Mr. *Paul* writing on the Back of the said Parchment.—That the Witness, after having set down the Negus, immediately left the Room; and after some short Time, he was called up into the Room again, and ordered to bring a Candle, which he accordingly did, which was for the purpose of sealing the Envelope or Cover.—That soon afterwards Mr. *Paul* came down Stairs and went away, and was, in a little Time, followed by *Elizabeth Caunter*, who likewise went away: That thereupon the Witness went up into the said Dining-Room, and was desired by the Testator and the said *Josias Salter*, to drink some Negus with them, which he did; and then saw the same Paper-Parcel as aforesaid lie on the Table; and the same being taken up by the said *Josias Salter*, the Witness saw that it was sealed: and *Josias Salter* holding it in his Hand, said, There was the Thing, which he had so long been uneasy about, and so willing to have done; that it was *Michael's* Will, and that he had now settled all Things to his Mind.—Fourthly, The Testimony of Two other Witnesses, who positively swore to their having seen and conversed with the said *Josias Salter* and *Elizabeth Caunter* at *Exeter*, in the beginning of *August* 1766, during the Fair; and to their being informed by them, that they had been with the Testator upon Business concerning his Will; and the Testimony of Two Persons to the seeing the Testator and the subscribing Witnesses to his Will at the *Turk's-Head*, at the Time of the supposed Execution of it, as deposed by *John Vicars*.—And Fifthly, The concurrent Evidence of a great Number of Witnesses, who all swore to the long and particular Intimacy and Friendship, between the Testator and the Respondent *Hite*; and to repeated Declarations of the Testator, of his great Obligations to Mr. *Hite*, and that he should have starved but for his Assistance; and that he was determined to make him Satisfaction for the Favours that he had received, whenever it should be in his Power.

Verdict.

Upon this Evidence, the Jury, after having withdrawn for a few Minutes, brought in their Verdict in Favour of the Will.

Observations on the whole Evidence.

The most material Contrariety in the Evidence upon this Trial, appears in the different Accounts given of the Locality of *Elizabeth Caunter* at the same Time. For as to *Josias Salter*, it appeared by the Appellant's own Witnesses, that he went to *Exeter* with the Testator on the 6th or 7th of *August*, and continued there some Days; that though he was ill of a Dropsy, yet he was very capable of walking from his Lodgings to the *Turk's-Head*, where the Will was proved to have been executed. And though Five Witnesses were produced for the Appellant, in order to prove that *Elizabeth Caunter* was, at the Time in Question, and for some Days before, in a declining State of Health, and had not been absent from her Place of Habitation so long as the Nature of the Transaction required, and was not in a Condition to ride; yet such Evidence, which rested chiefly in Opinion, and about which it was impossible for any of the Witnesses to speak with absolute Certainty, could have no Weight, when opposed to such clear, certain, and unquestionable Proof, as had been given by so many Witnesses, not only of the Fact of her being then at *Exeter*, but also of her Hand-writing as a Testamentary Witness (about which there was no Doubt): For although it was at first proposed on Behalf of the Appellant, as a Ground of Objection, that the Names of the Testator, and of the Witnesses appearing to the Will, were unlike their usual Manner of Hand-writing, yet the Similitude of every one of their Hands was so irresistibly proved by such a Number of Witnesses competent to that Question, and among the rest by her own Sister, that it was soon acquiesced in on behalf of the Appellant.

The supposed Declarations of the Testator and of his Friend Mrs. *Caunter*, to the Effect of no Will having been made, if in truth they did make such Declarations, are very easily accounted for, when it is considered how anxious the Testator was to conceal from his Wife the Knowledge of it, under the perpetual Apprehension that it would breed a Disturbance in his Family.

Motion for a new Trial. In Easter Term 1771, the Appellant thought proper to apply by Motion to the Court of Chancery for a new Trial of the former Issue; and the learned Judge, before whom that Issue was tried, having made his Report of such Trial, to the Lord High Chancellor, the Motion came on, and was very fully argued by the Counsel on both Sides, on Three several Seal Days, after Trinity Term 1771: And on the 9th of July, in that Year, his Lordship was pleased to refuse the Motion; declaring, *That both himself, and the learned Judge who tried the Cause, were perfectly satisfied with the Verdict.*

Refused.

3d March, 1773, Order on former Appeal. From this Order the Appellant thought proper to appeal to your Lordships, praying that the same might be reversed, and a new Trial granted; and, on hearing that Appeal on the 3d of March, 1773, your Lordships were pleased to order and adjudge, That the Order complained of should be affirmed, with the following Addition, viz. "That the Parties do proceed to another Trial at the next Summer Assizes for the County of Devon, upon the same Issue: and that the Respondents be Plaintiffs at Law, and the Appellant be Defendant, who is forthwith to name an Attorney to accept a Declaration, appear and plead to Issue." And it was further Ordered, that the Appellant should pay the Respondents their Costs in the former Trial; and that the Court of Chancery should give all proper Directions for carrying that Judgment into Execution.

Second Trial. In Consequence of this Order, the Issue was Tried at the Summer Assizes for the said County of Devon, in the Year 1773, before the late Mr. Baron Adams, and a special Jury; when, after a Trial of near 18 Hours, the Jury brought in a Verdict in favour of the Appellant against the Will.

State of Evidence on the second Trial. On this last Trial, the Evidence on both Sides was in Substance the same as on the former Trial, save only, that with respect to the supposed *Alibi* of *Elizabeth Caunter*, on which the Appellant had chiefly relied, the Respondents produced two new Witnesses of undoubted Credit and Circumstances, who clearly and positively disproved it. One of them, namely, Mrs. *Alice Morris*, a Hosier, swearing that *Caunter* was in her Shop at *Exeter* during *Lammas Fair*, 1766, and that she went from thence to the *Turk's-Head*; and Mrs. *Saunders*, the other, a Gentlewoman of Fortune, who lodged in the same House with *Caunter*, at the Time in Question; swearing, that *Elizabeth Caunter* was not confined by Illness, till the 20th of August, and that she was before only occasionally ill; and was capable of riding to *Exeter* on Horseback at the Time in Question.

New Witnesses introduced by Appellant. The Appellant having received previous Intimation of the Purport of this additional Evidence, and conscious that she could not sustain her first Ground of Defence, then relied on the supposed *Alibi* of *Josias Salter*, and attempted to prove the same in another Manner than had been done on the former Trial. For a Circumstance in the Evidence of one of the Witnesses at the first Trial having enabled the Appellant to fix the Day of executing the Will to be upon the 7th of August, Recourse was had to two new Witnesses, *Josiah Rogers*, a poor labouring Gardener, and his Wife, to prove the *Alibi* of *Josias Salter*, which had been strongly relied upon, though clearly refuted upon the former Trial: The Evidence of *Josiah Rogers* was, that *Salter* was tapped for a Dropsy in July 1766. He was tapped a second Time at the *Barnstaple Inn*, by Mr. *Symonds*, on the 8th of August, during *Lammas Fair*. On the 7th this Witness was fetched to the *Barnstaple Inn* by his Wife: He went there about One o'Clock, and saw *Josias Salter* there, dined with him there, and staid with him all the Afternoon till he went to Bed, and helped him to Bed; he was so bad of the Dropsy, that he could hardly go across the Room; he dined in his Bed-Chamber: This Witness is sure, that from the Time he first came there, *Salter* was not out at the *Turk's-Head*, or any where else: Testator was also with him on the 7th all the Afternoon. He staid there the 8th, and was tapped; and on the 9th, he went to the Testator's House at *Sowton*, a few Miles from *Exeter*, where he died.

Elizabeth Rogers swore she saw *Josias Salter* at the *Barnstaple Inn* on the 7th of August, the Day before he was tapped; saw him first between Eleven and Twelve that Day; Testator and his Wife were there; they sent her to fetch *Josiah Rogers*, her Husband; he went between Twelve and One: The Witness went again between Two and Three: They were all there then; nothing was said of their having been at the *Turk's-Head Inn*.

Remarks thereon. It is very observable that neither of these Persons had ever before been examined to this Matter; though *Rogers*, the Husband, had been examined a Witness in the Cause in Chancery upon no less than Eight Interrogatories on the Behalf of the Appellant; with whom he and his Wife have been long and intimately acquainted; and, it is hardly to be imagined, that a Matter of so much Importance should remain undivulged, during a Controversy upon the Subject for Seven Years together; and that of a sudden, two Persons of so low a Station in Life, should be able, without the Aid of any written Memorandum, at the Distance of Eight Years, to recollect Dates and Times of a Transaction, of no Importance in itself, and quite uninteresting to them, with precise Certainty, even to an Hour.

Mr. Paul's Books and Papers produced on the second Trial. Before and at the first Trial it was much insisted upon, that Mr. *Paul* kept his Accounts of Cash received for all Business done by him as an Attorney with such Accuracy, that by that it would appear that he did not attend the Execution of this Will, which was relied upon as an Evidence of great Importance; and one of the chief Grounds of Objection to the Verdict then found in Favour of the Will, was, that the Judge before whom the Issue was tried, would not suffer that Book to be produced after the Evidence had been observed upon, and he had summed it up.—But now, upon the second Trial, *Paul's* Books and Papers were produced, by which it appeared that they were very inaccurately kept; that there were several Chasms in them, for many Days and Weeks together; and that it was impossible to form any Opinion concerning the Truth of his acting as an Attorney in this Business, from any Entry made, or omitted, in any of his Books or Papers.

From this State of the Evidence on both Trials, these Observations naturally arise: 1st. That the actual Execution of the Will is proved in the strongest and most positive Manner that any Fact of that Nature is capable of, where all the subscribing Witnesses are dead: 2d. That if the Fact of *Elizabeth Caunter's* being at *Exeter* during the *Lammas Fair* of 1766, when the Will is proved to have been executed, be not true, Five Witnesses of unimpeached Credit and Character must be deemed guilty of Perjury, in order to establish the Testimony of a single positive Witness, who was only a Maid-Servant in the House of Mr. *Brake*, where *Caunter* lived; for every Witness to support her Testimony speaks from Opinion only.

20th Jan. 1774, Order for another Trial. The Respondents therefore apprehending that the second Verdict was contrary to the Weight of Evidence in the Cause, applied by Motion to the Court of Chancery for a new Trial of the former Issue; and upon full Debate of the Matter, the Lord Chancellor, on the 20th of January last, was pleased to order another Trial of the said Issue at the then next Lent Assizes for the County of Devon.

8th Feb. 1774, Order for Trial at Bar. And upon a second Application by the Respondents for a Variation of this last Order, by having the Issue tried at the Bar of the Court of King's-Bench, by a Jury of the County of *Middlesex*, his Lordship was pleased, on the 8th of February last, to direct the said Issue to be tried at the Bar of the Court of King's-Bench, in the next Easter Term, or at such other Time as that Court should appoint, by a Jury of the County of *Devon*; upon the

Respondents

Respondents *Edward Ramsey*, and *Jane* his Wife, consenting to take *Nisi Prius* Costs, in case a Verdict should be found in Favour of the Will.

Appealed from.

From both these Orders the Appellant has thought proper to appeal; but the Respondents humbly hope that the same will be respectively affirmed, for the following (among other)

R E A S O N S :

- I. Because all Issues of this Kind are intended to inform and satisfy the Conscience of the Court by which they are directed. And where, as in the present Case, two different Verdicts are found upon the same Evidence, it is almost of Course to grant a third Trial; for otherwise it is scarcely possible for the Conscience of the Court to be satisfied: For where two Verdicts are contradictory, one does not merit greater Credit than the other.
- II. The Weight of Evidence on both Trials, and particularly on the last, being in Favour of the Will, the second Verdict must, in that Respect, be considered as contrary to Evidence; which has always been held a good Ground for granting another Trial.
- III. Because the Facts in this Case being both numerous and complicated, it seems highly expedient, for the Quiet and Satisfaction of the contending Parties, that they should again be examined into, and finally discussed, in the most solemn Manner that the Constitution of this Kingdom will permit. And though the great Expence attending this Mode of Discussion, forms the Appellant's only solid Objection to it, yet the Force of that Objection is obviated by the Respondents having consented to take only *Nisi Prius* Costs, in case another Verdict be found in their Favour.

E. THURLOW.

W. DAVY.

JOS. BROWN.

F. BULLER.

Die Martis 31. Januarij 1775.

*Ordered and Adjudged That the Orders
Complained of be Reversed.*

HOUSE OF LORDS.

Ann Salter, - - - Appellant.
Francis Hite, and Others, - - Respondents.

CASE of the Respondents Francis
Hite, Edward Ramfey, and Jane his
Wife, John Partridge the Elder, John
Partridge the Younger, and Samuel
Mare.

To be Heard at the Bar of the House of Lords,
on the Day of
1774.

